LEONG HUAT SAWMILL (PTE.) LTD. v. LEE MAN SEE

[F.C. (Wan Suleiman, Mohamed Azmi and Hashim Yeop A. Sani F.JJ.) June 14 & August 18, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 105 of 1983]

Contract – Agreement to extract timber from forest land – Breach of contract – Finding of fact by trial judge – Damages – Claim for additional wages – Promissory estoppel – Contracts Act, 1950, s. 26(b).

The appellants had engaged the respondent to extract timber in seven blocks of forest land referred to as Blocks A to G in Trengganu. The respondent sued the appellants for breach of contract and alleged in his statement of claim that he had completed felling timber in the said forest land and in breach of the agreement the appellant had failed to pay in full for the services rendered. He claimed $88,916.31 as special damages made up of (i) refund of $10,031.80 deposit paid by the respondent under the agreement, (ii) $43,173.63 for wages of workers from March to May 1979, and (iii) $35,710.88 for additional wages. In their defence the appellants claimed that the respondent did not in fact complete the work as he had stopped work before all the timber was completely felled and removed. The appellants counterclaimed for $190,148.62 as damages incurred in engaging other contractors to fell the remaining trees. The dispute in this case was which party committed the breach of the logging agreement. The learned trial judge came to the conclusion on the evidence that the respondent was free from blame but it was the appellants who were guilty of breach of the agreement. He accordingly gave judgment for the respondent in respect of the refund of the deposit and for the wages of workers. However, he dismissed the claim in respect of extra wages. The appellants appealed against the decision while the respondent cross-appealed against the disallowance of the claim for additional wages.

Held: (1) the appeal in this case on the issue of breach of contract was entirely against the finding of facts by the learned judge. Having regard to the evidence the findings of facts by the learned judge were supported by evidence and the inferences made by him from primary facts were also made on correct principles and on reasonable assessment of the evidence. It would be wrong for the appellate court to disturb the finding that the breach of agreement was in fact committed by the appellants. The respondent was therefore entitled to the refund of the deposit and for wages of workers;

(2) in regard to the claim for additional wages, there was no equitable estoppel in this case nor would section 26(b) of the Contracts Act apply since the compensation promised to be paid was subject to two preconditions, that it was payable only at the end of the contract and it must be subject to good performance, and both had not been proved to have been properly discharged by the respondent;

(3) in any case section 26(b) of the Contracts Act refers to a promise to compensate a person who has already voluntarily done something for a promisor or something which the promisor was legally compellable to do. The logging work done by the respondent was not voluntary nor can the work of extracting timber be described as something which the appellants were compellable to do. The promise to pay the additional wages cannot come under the purview of section 26(b) of the Act.

FEDERAL COURT.

R. Rajeswaran for the appellants.

G. Joseph (Victor Isaacs with him) for the respondent.

Cur. Adv. Vult.

Mohamed Azmi F.J. (delivering the Judgment of the Court): The dispute between the parties arose from a written Agreement made in Chinese on June 1, 1972 under which the appellants/defendants engaged the respondent/plaintiff to extract timber in seven blocks of forest land referred to as Blocks A to G containing a total area of 4,500 acres in the District of Paka, State of Trengganu. The appellants were sued by the respondent for damages for breach of contract, and by paragraphs 4, 5 and 6 of the Statement of Claim, the respondent alleged that he had completed felling timber in the said forest land in March 1979 and in breach of the Agreement the appellants had failed to pay in full for the services rendered. Under special damages he claimed a sum of $88,916.31 which comprised: (i) refund of $10,031.80 deposit paid by the respondent under the Agreement, (ii) $43,173.63 for wages of workers from March to May 1979, and (iii) $35,710.88 for additional wages. In their Defence the appellants averred that the respondent did not in fact complete the work as agreed in the Agreement and that he had stopped work in April 1979 before all the timber in the said forest land had been completely felled and removed and as such the respondent was not entitled to the sum claimed. By way of counterclaim, the appellants sued the respondent for damages in the sum of $190,148.62 which they had incurred as a result of respondent's breach of the Agreement by abandoning work on two of the seven forest compartments. They alleged that they had to pay this sum to two other timber contractors to complete the felling of the remaining trees in the two compartments.

On the pleadings, the learned Judge correctly in our view, determined the dispute on the basis of "which party committed the breach of the 1972 Logging Agreement" after logging work in five of

the seven compartments had been completed. On the evidence, the learned Judge came to the conclusion that the respondent was free from blame but it was the appellants who were guilty of the breach of the Agreement and accordingly he gave judgment for the respondent in respect of refund of deposit and for the wages of workers from March to May 1979. However, he dismissed the claim in respect of extra wages. The appellants appealed against the said decision, whilst the respondent cross-appealed against the disallowance of claim for additional wages.

On the issue of breach of contract, the learned Judge found that a dispute had developed between the parties after the respondent had completed work in Blocks A, B, C, F and G. The dispute began when the respondent was working in Block D and it continued with greater intensity in respect of Block E. As stated by the learned Judge –

"In my judgment the reason for the plaintiff's stoppage of work in Block E is traceable to his refusal to resume work in Block D. Because of his refusal to go back to log in Block D, the relationship between the plaintiff and the defendant had become strained and finally deteriorated to such an extent that the plaintiff thought it no longer worth his while to continue logging for the defendant. Hence he stopped work in Block E . . . . . Thus the dispute between the parties really started as a result of the defendant asking the plaintiff to go back to work in Block D, and his refusal to comply with the request."

The learned Judge gave reasons for his conclusion that the stoppage of work in both compartments was in fact caused by the appellants. In the case of compartment D, the respondent had to stop work because of the letter dated October 6, 1977 sent by the appellants to the Forest Department requesting for "Closure Report" indicating either that logging had been completed or that the appellants were no longer interested in that particular compartment. By taking such action the appellants had made it difficult or even impossible for the respondent to perform his part of the bargain under the Agreement. In our view, the learned Judge was justified in rejecting the appellants' contention that the letter to the Forest Department was sent because they were misled by the respondent. We agree with the learned Judge that the respondent had no hand in the writing of that letter and that the appellants were solely responsible for abandoning the forest permit and by doing so they had committed a breach of the Agreement. Further under Clause 4 of the Agreement, the respondent had to do logging work under the supervision and direction of the appellants. We find that the learned Judge was correct in accepting the respondent's evidence that he stopped work because he had cut all the trees that had been marked for felling by the appellants. The learned Judge was therefore justified in making the inference from that evidence coupled with the letter sent by the appellants to the Forest Department that the cessation of work by respondent in Block D had been due to the appellants own conduct. However, the learned Judge accepted appellants' evidence that subsequently the Forest Permit was reissued to them and when they requested the respondent to resume logging he had refused to comply. We think the request was unreasonable since the respondent had already ceased work and his workers had most probably been withdrawn from that area, and as such the refusal by the respondent to resume work there could not constitute a breach of the agreement.

As regards Block E, we are also in agreement with the learned Judge that on the evidence, particularly the monthly Statement of Accounts prepared by the appellants the respondent had stopped work in May 1979 and not March 1979. The contents of the documentary evidence supported the respondent's contention that the pleading in paragraph 4 of his Statement of Claim to the effect that he completed logging in March 1979 was an error which could not have taken the appellants by surprise. To interpret the document in any other way would distort the clear contents in the Statement of Accounts that the figures were for the months to which the statement relates. Thus at page 93 of the Appeal Record, when the appellants' account stated "production of 1,142 logs for the month of May" and credited the respondent with $21,009.71, the credit given must be for production of logs for May and not for earlier month as suggested by the appellants, notwithstanding the actual date the account itself was prepared. We are in agreement with the learned Judge that the cessation of work in Block E was due to appellants' conduct in making it difficult for the respondent to carry on particularly by delaying payments and even by refusing to pay for money due when demanded in May 1979. We are entitled to take judicial notice of the fact that in logging operation in the jungle, the workers must be paid promptly and although under Clause 12 of the Agreement labour charges should be calculated once at the end of each month, we see no reason to disturb the learned Judge's observation that under the Agreement payment must be made by the appellants as soon as the amount due to the

workers was calculated. Refusal to pay would certainly constitute a serious breach of the Agreement. The appeal in this case on the issue of breach of contract is entirely against the finding of facts by the learned Judge. It is our conclusion having regard to the evidence that the findings of fact by the learned Judge are supported by evidence and the inferences made by him from primary facts are also made on correct principle and on reasonable assessment of the evidence. In the circumstances it would be wrong for us to disturb his finding that the breach of the Agreement was in fact committed by the appellants. The respondent was therefore entitled to the refund of his deposit as well as for wages due from March to May 1979.

As regards the dismissal of the appellants' counter-claim for expenses for having to employ Syarikat Ah Moi ($79,793.97) and Syarikat Fong Trading ($110,354.65), this must necessarily follow from the finding of the learned Judge that it was the appellants who were responsible for the breach of contract and the cessation of work in both Blocks D and E. If at all the appellants had suffered such additional expenses, they must in the circumstances bear the loss themselves since the expenses were incurred as a result of their own breach of the Agreement.

The cross-appeal by the respondent against the refusal of the learned Judge to award him the sum of $35,710.88 for additional wages for six months from December 1978 to May 1979, is the only matter which has caused us some concern. These additional wages were based on an oral undertaking by the appellants to pay the respondent an extra $1/- per ton of logs at the completion of the Agreement. For purposes of accounting, the appellants had credited this *ex-gratia* payment in the monthly statement of accounts for the six month period although no money had actually been paid to the respondent. The main thrust of respondent's argument is that although the undertaking to pay was without consideration, it is enforceable under the principle of promissory estoppel. We are referred to a passage in *Sanjiva Row's* Contracts, Vo. 1, 7th Edn. 1968, page 591 which states:–

"The idea of promissory estoppel – According to it, the reason for the enforcement of a promise is the justifiable reliance upon the promise. It is wrongful for the promisor, who has aroused expectation in the promisee and induced him to act to withdraw from his promise. In *Finlay* v. *Swirsky*, the Court said: 'Every sufficient consideration contains the substantial elements of an estoppel in pais, for, if a man by his promise induces another to change his position and is then permitted to deny the validity of the promise, he is thus perpetrating a fraud. The law will not permit this'."

We are also referred to Section 26(b) of the Contracts Act 1950 which provides:–

An agreement made without consideration is void, unless it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do.

The respondent also argues that after having completed five of the seven logging blocks and since the appellants had already credited in his favour the accumulated sum of $33,058.39 up to the month of January 1979 (see Appeal Record page 81) it is inequitable for the trial Judge not to award the claim for additional wages particularly having regard to the fact that the respondent had been found free from blame for the breach of contract. The respondent's argument certainly contains considerable force, but we must agree with the learned Judge that in this particular case the sum is not payable although the law argued before us on this point was not advanced or properly advanced at the trial. Under cross-examination the respondent (PW2) admitted that "this extra $1.00 per ton was not part of the contract but it was agreed that it would be payable at the end of the contract subject to good performance". From this admission, it seems clear to us that the promise to pay the extra wages is not without preconditions. First, it is only payable at the end of the contract and secondly it must be subject to good performance. The first precondition could not possibly be satisfied as the 1972 Agreement was never completed. As to the second precondition, for the Court to assume in the absence of proper evidence that there had been good performance would be to fly in the face of the very dispute between the parties which clearly indicated everything was not well as to the performance of the Agreement albeit towards the latter half of the contract period. In our view there is no equitable estoppel in this case, nor would Section 26(b) of Contracts Act apply since compensation promised to be paid is subject to two preconditions and both had not been proved to have been properly discharged by the respondent. Section 26(b) refers to a promise to compensate a person who has already voluntarily done something for a promisor, or something which the

promisor was legally compellable to do. The logging work done by the respondent was not voluntary nor can the work of extracting timber be described as something which the appellants were legally compellable to do. In our view the promise to pay the extra $1/- per ton cannot come under the purview of section 26(b).

Both the appeal and cross-appeal must be dismissed and we order that each party should bear its own costs. The appellants must of course pay the costs in the court below. The deposit to be refunded.

Order accordingly.

Solicitors: *Shook Lin & Bok; Lawrence & Joseph.*

TAY TONG CHEW & ANOR. v. ABDUL RAHMAN BIN HAJI AHMAD

[F.C. (Lee Hun Hoe C.J. (Borneo), Mohamed Azmi and Hashim Yeop A. Sani F.JJ.) June 19 & August 18, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 250 of 1983]

Tort – Road Accident – Negligence – Contributory negligence – Damages – Proof of special damages – Pain and suffering and loss of amenities – Loss of earning capacity.

Damages – Knee – Amputation above – Future earnings – Quantum not agreed – Duty of court.

The respondent was on his way home on his motorcycle when he was knocked down by a motor car driven by the second appellant and owned by the first appellant. He sued the appellants for damages. The learned Judicial Commissioner who heard the case found the collision was caused by the negligence of the motor car driver and awarded the respondent $70,000/- general damages for pain and suffering and loss of amenities. He allowed the sum of $1,170/- for special damages and also awarded a sum of $18,000/- for the cost of the hip and knee joint operation and $500/- for the purchase of special shoes. He also held that the respondent was entitled to damages for loss of future earnings but he left it to the solicitors of both parties to work out the award. The appellants appealed.

Held: (1) there was evidence to support the conclusion that the second appellant did not stop at the "Stop, Look Go Sign" at the junction before turning right into the main road and he was therefore guilty of negligence in colliding with the respondent. The collision could not have occurred if the appellant's motor car had stopped at the junction and allowed the respondent's motorcycle which had the right of way to pass the junction completely before turning right into the main road. The respondent was blameless and was not guilty of contributory negligence;

(2) it is the function of the court to assess damages and where the quantum is not agreed on by the parties on any item as in the present case, it is both unreasonable and undesirable to order them to assess the damages themselves;

(3) having regard to the trend of awards on leg amputation above the knee, the award of $70,000 for pain and suffering and loss of amenities in this case was a wholly erroneous estimate of the damage suffered. The award is manifestly excessive and the award should be reduced to $40,000/- which is a fair and equitable compensation under this item;

(4) loss of future earnings had not been proved in this case but the respondent should be compensated for injury to his earning capacity. Taking into account all past and future contingencies, an award of $12,000/- for loss of earning capacity would be fair and adequate in this case;

(5) the award of special damages should be reduced to $300/- as there was only evidence to support this amount, the claim for special shoes should be set aside for lack of evidence that such shoes were required by the respondent but the award of $18,000/- for cost of surgical operation should remain.

Cases referred to:

(1) *K.R. Taxi Service Ltd. & Anor.* v. *Zaharah & Ors.* [1969] 1 M.L.J. 49.
(2) *Tan Tsin Keong* v. *A. Somanaidu* F.C.C.A. No. 23 of 1972.
(3) *Lim Soon Poh* v. *Ng Kong Lum* [1975] 2 M.L.J. iii.
(4) *Tan Thua Chye* v. *Tan Chun Eng* K.S. Dass on Quantum Vol. 2 p. 142.
(5) *Abdul Wahab bin Kachi Mydin* v. *Gan Ah Hoe* [1978] 1 M.L.J. 186.
(6) *Marie De Cruz* v. *Loo Siew Kong* K.S. Dass on Quantum Vol. 2 p. 354.
(7) *Teh Hwa Seong* v. *Chop Lim Chin Moh & Anor.* [1981] 2 M.L.J. 341.
(8) *Shari bin Abdul Rahman* v. *Attorney-General* [1979] 1 M.L.J. xxxix.
(9) *Tay Yong Kee* v. *Ng Aik Peng* K.S. Dass on Quantum Vol. 2 p. 276.
(10) *Chan Chook How* v. *Tan Nyoke Hoe* [1979] 1 M.L.J. xxxix.
(11) *M.U. Abdullah s/o Mohamed* v. *Mohamed Mazir bin Mohamed Hassam & Anor* K.S. Dass on Quantum Vol. 2 p. 274.
(12) *Lim Meng Choo & Anor.* v. *Paya Lebar Bus Service* [1975] 2 M.L.J. iv.
(13) *Elangovan* v. *Lee Yew Kow & Anor.* [1977] 1 M.L.J. lxxx.
(14) *Mahmood bin Kailan* v. *Goh Seng Choon & Anor.* [1976] 2 M.L.J. 239.
(15) *Murugan s/o Poomile* v. *Lew Chu Cheong* K.S. Dass on Quantum Vol. 2 p. 266.
(16) *Ibrahim bin Samsudin* v. *Kong Pak Kooi* K.S. Dass on Quantum Vol. 2 p. 266.
(17) *Yen Kwai Lan* v. *Lim Eng Hin* K.S. Dass on Quantum Vol. 2 p. 267.
(18) *Seenivasan & Anor.* v. *Lim Yew Seng* [1961] M.L.J. 22.